IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Arbitration Case No.19 of 2007

Date of Decision: 20 - 11 - 2007

M/s Continental Construction Limited **....Petitioner**

through Mr.Vikas Suri, Advocate

v.

State of Haryana and another **....Respondents**

through Mr.B.S.Rana, Addl.A.G., Haryana for respondent No.1.

CORAM: HON'BLE MR.JUSTICE VIJENDER JAIN, CHIEF JUSTICE

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1. Whether Reporters of Local Newspapers may be allowed to see the judgment?

2. To be referred to the Reporters or not?

3. Whether the judgment should be reported in the Digest?

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VIJENDER JAIN, CHIEF JUSTICE (ORAL)

Learned counsel for the parties admit the arbitration clause which is to the following effect:-

> "If any dispute or difference of any kind whatsoever (the decision whereof is not herein otherwise provided for) shall arise between the Employer and the Contractor in connection with, or arising out of the Contract, or the execution of the Works, whether during the progress of the Works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall, in the

first place, be referred to and settled by the Engineer who shall, within a period of sixty days after being requested in writing by the Contractor to do so, give written notice of his decision to the Contractor, subject to arbitration, as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor and shall forthwith be given effect to by the Contractor, who shall proceed with the execution of the Works with all due diligence whether he or the Employer requires arbitration, as hereinafter provided, or not. If the Engineer has given written notice of his decision to the Contractor and no claim to arbitration has been communicated to him by the Contractor within a period of sixty days from receipt of such notice, the said decision shall remain final and binding upon the Contractor. If the Engineer shall fail to give notice of his decision, as aforesaid, within a period of sixty days after being requested as aforesaid, or if either the Employer or the Contractor be dissatisfied with any such decision, then and in any such case either the Employer or the Contractor may within sixty days after the expiration of the first-named period of sixty days or receiving notice of such decision, as the case may be, require that the matter or matters in dispute be referred to arbitration as hereinafter provided. All disputes or differences in respect of which the decision, if any, of the Engineer has not become binding as aforesaid shall, on the initiative of either party be referred to the adjudication of a Committee of three arbitrators. The Committee shall be composed of one arbitrator to be nominated by the Employer, one to be nominated by the Contractor and the third, who will also act as the Chairman of the Committee, to be nominated by the Director-General (Road Development), Ministry

of Transport, Department of Surface Transport & Roads Wing), Government of India. If either of the parties abstain or fail to appoint his arbitrator, within sixty days after receipt of notice for the appointment of such arbitrator, then the Director-General (Road Development), Ministry of Transport, Department of Surface Transport (Road Wing), Government of India, himself shall also appoint such arbitrator(s). A certified copy of the appointment made by the Director-General (Road Development) in the Ministry of Transport, Department of Surface Transport (Roads Wing), Government of India, shall be furnished to both parties.

Save as otherwise provided in the Contract, the arbitration shall be conducted in accordance with the provisions of the India Arbitration Act, 1940 or any statutory modification or enactment thereof and shall be held at such place and time in India as the Committee of Arbitrators may determine. The decision of the Majority of the Arbitrators shall be final and binding as may be determined by the Arbitrators.

Performance under the Contract shall continue during the arbitration proceedings and payments due to the Contractor by the Employer shall not be withheld, unless they are the subject matter of the arbitration proceedings.

All awards shall be in writing and such awards shall state reasons for the amounts awarded. No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrators as aforesaid and neither party will be limited in the proceedings before such arbitrators to the evidence of arguments put before the Engineer for the purpose of obtaining his said decisions."

As per arbitration clause, all disputes are to be adjudicated upon by a committee of three arbitrators, one to be nominated by the employer, one to be nominated by the contractor and the third who shall act as Chairman of the Committee, to be nominated by the Director General (Road Development), Ministry of Transport, Department of Surface Transport & Roads Wings, Government of India and if either of the parties abstain or fail to appoint the Arbitrator within sixty days after receipt of notice for appointment of such arbitrator, then the Director General (Road Development), Ministry of Transport, Department of Surface Transport (Road wing), Government of India, shall appoint such arbitrator. A certified copy of the appointment made by the Director General (Road Development) in the Ministry of Transport, Department of Surface Transport (Roads Wing), Government of India, shall be furnished to both parties.

This case has a chequered history. At an earlier point of time, on invocation of the arbitration clause, a committee of three arbitrators was appointed which gave its award on 27.3.2003 by majority. That award was challenged by the respondents in the Court of Civil Judge (Sr.Division), Karnal by moving an application under Sections 14 and 17 of the Arbitration Act, 1940. While accepting that application, Civil Judge (Sr.Division), Karnal set aside the award and remanded the matter back to the committee of arbitrators with a direction to pass the award again as per law within a period of four months.

Pursuant to the decision of Civil Judge (Sr.Division), Karnal, petitioner herein wrote a letter on 30.12.2004 nominating Shri L.C.Chawla, retired Chief Engineer, Military Engineering Services as member of the Committee and calling upon the State of Haryana to nominate its member. A copy of that letter was also sent to the Director General (Roads Wing), Ministry of Surface Transport, Government of India, New Delhi (hereinafter to be referred as,`respondent No.2') with a request to nominate the third arbitrator who would have to act as Chairman (Presiding Arbitrator) of the Committee. Respondent

No.2 appointed one Shri N.V.Mirani, retired Principal Secretary as its nominee who on 25.1.2005 withdrew from the committee on the ground of ailment.

In the meanwhile, against order dated 8.11.2004 passed by the Civil Judge (Sr.Division), Karnal, State of Haryana preferred an appeal before the Additional District Judge, Karnal. The said appeal was dismissed by the Additional District Judge, Karnal on 23.8.2005.

On dismissal of the appeal, petitioner herein again wrote a letter dated 21.9.2005 requesting respondent No.1 to appoint its nominee as per Clause 67 of the special conditions of the contract agreement for adjudication of the dispute. A copy of the said letter was also sent to respondent No.2 with a request to appoint the Chairman (Presiding Arbitrator) of the new committee. No action was taken either by respondent No.1 or by respondent No.2 with regard to appointment of their nominee. Hence, the present petition was filed.

On notice, Additional Advocate General, Haryana and Shri Vipin Sharma, Executive Engineer put in appearance on 10.9.2007 on behalf of respondents No.1 and 2 respectively.

Learned Additional Advocate General, Haryana made a statement on 10.9.2007 that on 7.9.2007, an Arbitrator has been appointed by the State of Haryana, whereas Shri Vipin Sharma, Executive Engineer appearing on behalf of respondent No.2 stated that Ministry of Surface Transport, Government of India is in the process of appointing an Arbitrator.

The matter was adjourned to 11.10.2007, on which date no body put in appearance on behalf of respondent No.2 and since the respondents had not supplied the vacancy as per arbitration clause, counsel for the petitioner contended that respondents have forfeited their right to supply the vacancy as they have appointed the Arbitrator after filing of the present petition. Counsel for the petitioner further contended that petitioner has given eight suggested names of arbitrators in Annexure A-7 at page 54 of the paper-book.

Counsel appearing for State of Haryana prayed for time to seek instructions. At his request, the matter was adjourned to 30.10.2007 and it was directed that notice of default be also sent to the Assistant Solicitor General of India, as no body has put in appearance on behalf of respondent No.2. Today again no body has put in appearance on behalf of respondent No.2 despite service of notice of default upon the Assistant Solicitor General of India.

Today Mr.B.S.Rana, Additional Advocate General, Haryana has supplied a list containing three names for being appointed as one of the nominee/arbitrator. Counsel for the petitioner made a statement that one arbitrator may be appointed from the list supplied by Mr.Rana.

In view of the statement made by counsel for the parties, I appoint Shri Subhash Jindal, CGM, National Highway Authority of India as nominee/arbitrator on behalf of respondent No.1.

Since no body has put in appearance on behalf of respondent No.2, he is proceeded ex parte.

As per the available records, respondent No.2 has not appointed its nominee/arbitrator in accordance with Clause 67 of the special condition of arbitration agreement, pursuant to the request made in this regard by the petitioner in its letter dated 21.9.2005, therefore, it has lost its right to supply the vacancy. At this stage, Mr.Rana informed the Court that the third arbitrator has been appointed by respondent No.2 on 19.9.2007 i.e. after service of notice of the present petition.

It is not in dispute that the present petition was filed on 18.11.2006. Upon notice of the petition, respondent No.2 had put in appearance before this Court on 10.9.2007 through Mr.Vipin Sharma, Executive Engineer. Since the appointment made by respondent No.2 on 19.9.2007 is after receipt of notice of the petition, respondent No.2 has lost its right to supply the vacancy in terms of the arbitration clause.

Therefore, I appoint Shri R.S.Jindal (retired Chief Engineer of Delhi Development Authority) as the Presiding Officer to adjudicate upon all the disputes between the parties.

The Arbitrator shall fix his own fee.

The intimation of appointment shall be sent to the Arbitrator by the Registry.

Petition stands disposed of.

(VIJENDER JAIN)
CHIEF JUSTICE

November 20, 2007

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